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No. 85-14

In the Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. THOMAS, PETITIONER

v.

GENERAL SERVICES ADMINISTRATION AND
MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly relied on the Merit Systems Protection Board's findings of fact, where the Board proceeded on an erroneous jurisdictional theory, but in doing so engaged in precisely the same factfinding required to sustain its conclusions under the correct theory of jurisdiction.

2. Whether the court of appeals correctly held that the Merit Systems Protection Board's findings were supported by substantial evidence.

3. Whether petitioner is entitled to an award of backpay for the period during which he was suspended without pay, where the suspension was found to be fully justified.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 756 F.2d 86. The opinion and order of the Merit Systems Protection Board (Pet. App. 21a-38a) is unofficially reported at 84 F.M.S.R. ¶ 5391.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1985. A petition for rehearing was denied on April 5, 1985 (Pet. App. 19a-20a). The petition for a writ of certiorari was filed on July 2, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In March 1980, petitioner Charles A. Thomas began work as a training specialist for the Federal Protective Service (FPS), a division of the General Services Administration (GSA). When petitioner began to engage in bizarre and disruptive behavior, GSA ordered him to undergo a psychiatric fitness-for-duty examination. The examination, which was conducted in March and April 1982, disclosed that petitioner was suffering from a paranoid personality disorder. Petitioner was then placed on involuntary sick leave. Pet. App. 2a-4a.

On May 27, 1982, GSA notified petitioner that he was to be placed on indefinite suspension while the agency decided whether to apply for disability retirement on his behalf. The suspension was predicated on the adverse impact petitioner's behavior had on productivity and morale. Petitioner had, for example, frequently used a realistic replica of a .45 caliber pistol to practice marksmanship at the office, he exhibited a preoccupation with the martial arts (including demonstrations on vending machines), made revolutionary statements, constantly stared at others, provoked arguments and, while slashing a cardboard box with a pair of scissors, commented that "even this is too good for her." Pet. App. 3a-4a, 23a.

GSA proceeded with a disability retirement application. In a letter dated June 24, 1982, petitioner was notified that, as of June 29, 1982, he was being suspended indefinitely while the retirement application was pending before the Office of Personnel Management (OPM). Pet. App. 44a. The present case arises from petitioner's appeal of that suspension.[1]

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[1]Petitioner was later removed from his position. That removal is not involved in this proceeding. Pet. App. 2a n.1, 6a n.2.

2. Initially, petitioner appealed to the Merit Systems Protection Board (MSPB or Board). On April 15, 1983, the Board's presiding official rejected petitioner's claim that he had been suspended for being a "whistle-blower"; nevertheless, GSA's decision was reversed because the agency had not proved that the suspension promoted the efficiency of the service. Pet. App. 81a. Both parties appealed to the full Board. The Board reviewed the case in detail and concluded that (*id.* at 35a-36a):

> the cumulative effect of the evidence, especially the psychiatric fitness-for-duty report, establishes that [petitioner] was not ready, willing, and able to perform the duties of his position because of his mental condition during the period in question. The record is replete with ample, corroborated evidence warranting the agency action placing [petitioner] in enforced leave without pay status in order to remove him from the workplace. [Petitioner] was a disruptive, threatening force in the workplace and his behavior was frightening to his co-workers. Accordingly, we find that [petitioner] was unable to perform his duties in the structure of the workplace without constituting a threat to the well-being of his co-workers. The presiding official's contrary findings were erroneous and are reversed.

Because the Board also concluded that its authority was limited to appeals from disciplinary suspensions of persons who are "ready, willing, and able" to work, and the facts supported the finding that petitioner was not "able," the Board therefore held that it lacked jurisdiction. *Id.* at 30a-31a, 36a-37a.

3. The court of appeals reversed the MSPB on the jurisdictional issue, but, based on the Board's findings of fact, upheld the agency's suspension action. The Federal Circuit

pointed out (Pet. App. 15a-16a) that the Board had thoroughly reviewed the record, that the Board's evaluation of the propriety of petitioner's remaining on active duty was well within its competence (*id.* at 17a), and that its findings and conclusions were supported by substantial evidence on the record as a whole (*ibid.*). Because these findings and conclusions resolved all issues necessary to deciding the case, "[t]here is no need for a further determination" of facts (*id.* at 16a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The factbound questions it presents do not warrant further review.

1. Petitioner contends (Pet. 16-22) that because the decision of the MSPB was nominally based on jurisdictional grounds, the Board "did not * * * determine whether the preponderance of the evidence supported GSA's claims" (*id.* at 16-17). This argument is without merit.

As is clear from the opinions of the Board and the court of appeals, the Board's legal conclusion that it lacked jurisdiction was premised on the same findings of fact that would be called for in deciding the case on the merits. The MSPB construed the term "suspension," as defined at 5 U.S.C. 7501(2), to be limited to disciplinary-type situations in which the employee is "able" or "fit" to perform all of the duties of his position. Pet. App. 28a-31a. Consistent with this interpretation, the Board viewed itself as having jurisdiction over strictly "disciplinary" suspensions but not over suspensions imposed because the employee's health made him unfit. In order to resolve this jurisdictional issue, the Board had to determine the threshold question whether petitioner was in fact able to perform his duties. After reviewing the entire record (see *id.* at 29a-35a), the Board

concluded that "the cumulative effect of the evidence * * * establishes that [petitioner] was not ready, willing, and able to perform the duties of his position because of his mental condition during the period in question." *Id.* at 35a-36a.

The Federal Circuit held that the MSPB's jurisdictional theory was incorrect and that the Board has jurisdiction over all cases involving suspensions based on disruptive conduct (Pet. App. 9a): "We hold that GSA's action in this case falls within the jurisdiction of the MSPB, whether that action be deemed taken for purely disciplinary motives (in the sense of punishment) *or* whether it was taken because it was necessary in order to place petitioner apart from his fellow workers during the period until the disability application could be acted upon by OPM." As the court of appeals noted, this holding in no way altered the Board's express finding that the agency had properly suspended petitioner because of his "disruptive" and "threatening" conduct at the FPS office. See Pet. App. 9a (quoting *id.* at 33a, 36a). That finding would dispose of the case under either the jurisdictional theory adopted by the court of appeals or the theory adopted by the Board. Accordingly, the court of appeals saw no reason to remand for the Board to duplicate its prior factual findings. That sensible decision does not warrant review by this Court.[2]

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[2]There is no merit to petitioner's contention (Pet. 17-20) that he was suspended in retaliation for being a "whistleblower." The MSPB's initial decision expressly found (Pet. App. 81a) that "there is no evidence of record other than [petitioner's] allegations, to show that the agency manufactured the disciplinary actions to cover a retaliatory intent." This Court need not detain itself considering an allegation for which the record furnishes "no evidence."

Nor is there merit to petitioner's claim that he was denied procedural rights under 5 U.S.C. 7701(c)(2)(A) because the notice of suspension lacked the "specificity" required by 5 U.S.C. 7513(b)(1). Pet. 18-19. Section 7513(b)(1) merely indicates that an employee against whom an

2. Petitioner contends (Pet. 22-26) that the court of appeals erred in holding that the MSPB's decision was supported by substantial evidence. As the court below noted (Pet. App. 15a-17a), however, the Board's opinion refers expressly to more than enough relevant evidence to allow a reasonable mind to accept its findings of fact. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 477 (1951). The evidence included the fitness-for-duty report of the psychiatrist petitioner himself had chosen (see Pet. App. 16a), testimony and a memorandum from Sara McColgan (Chief of the Program and Support Services Branch), who had counseled petitioner about his behavior problems at the workplace, a memorandum from John Ramos (a GSA supervisor), and live testimony from Nancy Zawadsky (a secretary at the office where petitioner worked). Pet. App. 31a-35a. The non-psychiatric evidence, which was presented to the Board as "illustrative" of petitioner's inappropriate, disruptive, and threatening behavior in the workplace (*id.* at 32a-33a), is by itself sufficient to meet the substantial evidence standard. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. at 477. When the psychiatrist's report, which also would alone constitute substantial evidence (see *Richardson* v. *Perales*, 402 U.S. 389, 402 (1971)), is added, the requisite showing is exceeded by a wide margin.[3]

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action is proposed is entitled to "at least 30 days' advance written notice," which petitioner certainly received. Furthermore, any "specificity" requirement that might be implied would easily be satisfied by the detailed letter (see Pet. App. 23a) that was sent to petitioner before his suspension. In any event, Section 7701(c)(2)(A) employs a harmful error standard, and petitioner has not alleged any respect in which he was handicapped in challenging the agency's action by the supposed lack of "specificity" in the pre-suspension letter.

[3]There is no merit to petitioner's contention (Pet. 22-23) that hearsay is inadmissible at MSPB hearings. See *Richardson* v. *Perales*, 402 U.S. at 402. Nor is petitioner on firmer ground in suggesting (Pet. 23) that because the Board "relied almost exclusively on hearsay" it violated a rule against relying *exclusively* on hearsay (*id.* at 24). As this Court

3. Finally, petitioner contends (Pet. 26-29) that he should be awarded backpay, under 5 U.S.C. 5596(b), for the time during which the challenged suspension was in effect. The statute limits awards of backpay to situations in which an employee is "found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action * * *." Petitioner is accordingly not entitled to an award of backpay because no "appropriate authority" found that his suspension was in any way unjustified or unwarranted. Both the MSPB and the Federal Circuit made findings that support the conclusion that petitioner's suspension was fully justified and warranted.

Petitioner relies solely on OPM's denial of the application for disability retirement that GSA had filed on his behalf. See Pet. 26-27. From this, petitioner argues that the "effect" of OPM's ruling is that GSA was "mistaken" in believing that he suffered from a psychiatric disability. *Id.* at 28. The only "effect" of OPM's ruling, however, is that petitioner is not entitled to the benefits of the Civil Service Retirement Act. This is a completely separate question from whether the agency was justified in suspending petitioner from his job, a question on which OPM did not pass. Cf. *Piccone* v. *United States*, 407 F.2d 866, 872 (Ct. Cl. 1969).[4]

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stated in *Richardson* v. *Perales*, 402 U.S. at 407-408, this argument is derived from a misreading of *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 230 (1938).

[4]Petitioner is incorrect in claiming (Pet. 28-29) that a conflict exists in the lower courts on the backpay issue. *Brown* v. *Department of Justice*, 715 F.2d 662 (D.C. Cir. 1983), was a case in which an agency suspended an employee solely because the employee had been indicted on criminal charges; the court held that if the employee was later acquitted on those charges, the agency must either dismiss him and justify that dismissal by a preponderance of the evidence or reinstate him with backpay. In the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1985

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present case, petitioner was in fact dismissed after OPM denied the application for disability retirement. See Pet. App. 2a n.1, 6a n.2. The other two cases on which petitioner relies (*Seebach* v. *United States*, 182 Ct. Cl. 342 (1968) and *Kleinfelter* v. *United States*, 318 F.2d 929 (Ct. Cl. 1963)) have been rejected by the same court that decided them. See *Piccone* v. *United States*, 407 F.2d at 872 & n.13.